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In the Supreme Court of the United States

OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
PETITIONER

v.

JOS. SCHLITZ BREWING COMPANY AND
STROH BREWERY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

An employer that withdraws from a multiemployer pension plan is required to reimburse the plan over time for the employer's statutory share of the unfunded vested benefits that existed at the end of the year preceding withdrawal. The issue presented by question 1 in the certiorari petition in this case is:

Whether, under 29 U.S.C. 1399(c)(1)(A), interest accrues on the withdrawing employer's liability for unfunded vested benefits (i) from the end of the year *preceding* withdrawal (the date as of which the employer's liability is calculated), (ii) from the date that the employer's withdrawal in fact occurred, or (iii) from the presumed date of the employer's first payment toward satisfaction of the liability (specified by 29 U.S.C. 1399(c)(1)(A)(i) to be the beginning of the year *after* the withdrawal occurred).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States on question 1 in the petition.[1]

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[1] The Pension Benefit Guaranty Corporation (PBGC) and the Secretary of Labor each have an interest in the issue presented by this case. The PBGC, a wholly owned government corporation, 29 U.S.C. 1302, is responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. 1301-1461, including the provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208. As part of its insurance program, the PBGC guarantees

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out at Pet. App. G1-G20, the following provisions of 29 U.S.C. 1399, added to the Employee Retirement Income Security Act of 1974 (ERISA) by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 94 Stat. 1208, are relevant to this case.

1. 29 U.S.C. 1399(c)(1)(A) provides, in relevant part:

> (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan

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the payment of certain pension benefits to participants in insolvent multiemployer pension plans. 29 U.S.C. 1361, 1431. The liability provisions of MPPAA are important to the financial stability of multiemployer plans and the PBGC insurance system. This brief does not represent the views of the PBGC. See note 9, *infra*.

The Secretary of Labor has specific enforcement responsibilities under Title I of ERISA, including its fiduciary responsibility provisions. For that reason, the Secretary has an interest in clarifying the circumstances in which trustees of multiemployer pension plans have a duty to collect interest on withdrawal liability.

> year. Actual payment shall commence in accordance with paragraph (2).
>
> (ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

2. 29 U.S.C. 1399(c)(6) provides:

> Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the [Pension Benefit Guaranty Corporation.]

STATEMENT

1. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) imposes liability on an employer that withdraws from a multiemployer pension plan for the employer's statutory share of the plan's unfunded vested benefits. 29 U.S.C. 1381(a). Calculation of the amount of that liability is a multi-step process. First, the plan's total unfunded vested benefits are calculated, generally as of the end of the plan year *preceding* the withdrawal. See 29 U.S.C. 1391(b)(2)(A)(ii), (c)(2)(C)(i), (c)(3)(A) and (c)(4)(A). Second, the employer's share of the plan's unfunded vested benefits is determined, pursuant to one of the allocation methods described in 29 U.S.C. 1391. See 29 U.S.C. 1381(b).[2] Third, where appropriate, the

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[2] The actual calculation is more complicated than the two preceding sentences of text describe. Under the "presumptive" method used in this case, for example, the withdrawing employer is assigned a share of various pools of unfunded

employer's share is adjusted pursuant to the special provisions in 29 U.S.C. 1381(b)(1)(A), (B), (C) and (D). See also 29 U.S.C. 1386, 1389, 1399(c)(1)(B), 1405; *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85, 95 & nn. 14-22 (3d Cir. 1990), cert. dismissed, 113 S. Ct. 1070 (1993). Thus, the amount of the employer's withdrawal liability is its prescribed share of the deficiency in the plan's funding (*i.e.*, the difference between the actuarial present value of vested pension benefits and the current value of plan assets), calculated as of the end of the plan year preceding withdrawal. See 29 U.S.C. 1393(c); *Combs* v. *Classic Coal Corp.*, 931 F.2d 96, 98 (D.C. Cir. 1991); *Masters, Mates & Pilots Pension Plan* v. *USX Corp.*, 900 F.2d 727, 733 (4th Cir. 1990).

A withdrawing employer is not required to pay its liability in one lump sum. Rather, clause (i) of 29 U.S.C. 1399(c)(1)(A) requires a schedule to be established for payment of the total amount of the employer's liability "over the period of years necessary to amortize the amount in level annual payments * * *,

vested benefits—the plan's unfunded vested benefits as of the end of the last plan year ending prior to the enactment of MPPAA in 1980, and the increase in the plan's unfunded vested benefits in each of the plan years ending after 1980—in each case reduced by five percent per year up to the year of withdrawal. See 29 U.S.C. 1391(b). As this Court has stated, the presumptive method imposes on the withdrawing employer "a liability proportional to the employer's share of contributions to the plan during the years of its participation." *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2273 (1993). Under all allocation methods, however, the last day of the plan year preceding the date of withdrawal is the latest date for which calculations are made relevant to determining the employer's share of the plan's unfunded vested benefits allocable to that withdrawal.

calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs." 29 U.S.C. 1399(c)(1)(A)(i). The *amount* of each annual payment is established by reference to the level of the employer's annual contributions to the plan prior to its withdrawal. 29 U.S.C. 1399(c)(1)(C).[3] The *number* of such annual payments "necessary to amortize" the employer's liability is determined in accordance with clause (ii) of 29 U.S.C. 1399(c)(1)(A). That provision specifies that "[t]he determination of the amortization period described in clause (i)"— *i.e.*, the number of "level annual payments"—"shall be based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). Those "assumptions" include the plan's actuarial interest rate.[4] Thus, the amortization schedule is to be based

[3] Clause (i) of subparagraph (A) of Section 1399(c)(1) specifies that the "level annual payments" are to be "determined under subparagraph (C)." Subparagraph (C) prescribes the complex formula for determining the amount of each annual payment, based on the employer's contributions during the ten years preceding the withdrawal.

[4] Subsection (c)(6) of 29 U.S.C. 1399 confirms that the plan's actuarial interest rate is among the assumptions referred to in subsection (1)(A)(ii). Subsection (c)(6) provides: "Except as provided in paragraph (1)(A)(ii), *interest* under this subsection *shall be charged* at rates based on prevailing market rates for comparable obligations" (emphasis added). This language plainly contemplates that "interest * * * shall be charged" under paragraph (1)(A)(ii); but rather than calculating that interest according to the "prevailing market rates" utilized in other circumstances under Section 1399 (see note 8, *infra*), the introductory phrase in subsection (b)(6) requires use of the interest rate "provided in paragraph (1)(A)(ii)" itself— *i.e.*, the

on the interest-rate assumption "used for the most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). The higher the actuarial interest rate under the plan, the longer will be the "period of years necessary to amortize" the employer's liability in level annual payments. 29 U.S.C. 1399(c)(1)(A)(i).

Section 1399(c)(1)(A)(i) requires that the amortization schedule be established "as if the first payment were made on the first day of the plan year *following* the plan year in which the withdrawal occurs" (emphasis added)—referred to as the "presumed first payment date"—and that each subsequent annual payment will be made on the first day of each subsequent year.[5] In fact, however, the employer is not required to commence making its withdrawal-liability payments until the plan issues a demand for payment. The plan is to make such a demand, setting forth the amount of liability and the payment schedule, "[a]s soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. 1399(b)(1). The employer must then begin payments in accordance with the schedule established by the plan "no later than 60 days after the date of the demand," even

interest rate that formed part of "the assumptions used for the most recent actuarial valuation for the plan."

[5] The Act limits the employer's liability to a maximum of 20 years of annual payments. 29 U.S.C. 1399(c)(1)(B). In practice, the statutory calculation often results in a payment schedule of less than 20 years. In this case, the payment schedule adopted by the arbitrator, and upheld by the court of appeals, requires quarterly payments over a period of less than eight years. See Pet. App. F5.

if the employer contests the amount of liability. 29 U.S.C. 1399(c)(2).[6]

Under this statutory scheme, the dates used to calculate the amount of withdrawal liability are not the same as the dates of actual events—such as the date of withdrawal and the date of the employer's first actual payment. Instead, the Act fixes the last day of the plan year *preceding* withdrawal as the calculation date for determining the employer's share of the plan's unfunded vested benefits, and requires the amortization schedule (with interest at the rate used in the most recent actuarial valuation of the plan) to be "calculated as if the first payment were made on the first day of the plan year *following* the plan year in which the withdrawal occurs." 29 U.S.C. 1399(c)(1)(A)(i) (emphasis added). The issue in this case is whether the employer's liability includes interest during the so-called "gap year" from the date of calculation of that liability (at the end of the plan year preceding withdrawal) to the date of the presumed first payment (at the beginning of the plan year following withdrawal).

2. a. The facts in this case were stipulated before the arbitrator. On June 1, 1981, following a breakdown in collective bargaining, respondent's union employees went on strike. Pet. App. A2, E8. On July 31, 1981, respondent announced that it was permanently closing its Milwaukee plant, and on August 14, 1981, respondent withdrew from the plan. *Ibid.*

[6] Although the amortization schedule is established on the basis of a series of annual payments, the withdrawing employer must make those payments in quarterly installments or at other intervals specified by plan rules. See 29 U.S.C. 1399(c)(3).

Petitioner calculated respondent's liability for its share of the plan's unfunded vested benefits as of the end of the prior plan year (December 31, 1980) and issued a demand for payment on September 29, 1981. *Id.* at A3, E8. Respondent made its first payment on October 29, 1981. *Id.* at E10.[7]

The plan included interest for the year of the withdrawal (1981) in its assessment of respondent's withdrawal liability. Pet. App. A15. The arbitrator excluded interest for that year, *id.* at E38-E40, explaining that because "the statute makes no provision for the payment of interest except on overdue payments,[8] it is not correct to assess pre-demand interest on a withdrawing employer by interpretation of the word 'amortize' " in 29 U.S.C. 1399(c)(1)(A)(i). Pet. App. E40.

b. The district court reversed the arbitrator. The court noted that MPPAA requires payment of the employer's withdrawal liability to be amortized over a period of time. The court concluded that "use of the word 'amortization' implied that interest on the liability would be included in the payments." Pet. App. D2 n.1.

c. The court of appeals reversed. Pet. App. A15-A18. It found no authority in MPPAA for assessing interest for the period before the employer's withdrawal from the plan. *Id.* at A17. Noting that multi-

[7] The payment schedule adopted by the arbitrator, and upheld by the court of appeals, requires 29 quarterly payments. Pet. App. F5.

[8] See 29 U.S.C. 1399(c)(3) (interest accrues on quarterly payment if not paid when due); 29 U.S.C. 1399(c)(5) (provision for immediate payment, upon default, of total outstanding liability and "accrued interest").

employer plans calculate their funding status only once each year, the court described the Act's year-end calculation date for withdrawal liability as merely an effort on the part of Congress to "spare[] actuaries the need to revalue plan assets and liabilities every time an employer withdraws during the year." *Ibid.* In the court's view, "[e]stablishing a simple rule for calculating funding shortfalls has nothing to do with interest, and the MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out." *Ibid.* The court also noted that, although the Act "specifically authorizes assessing the withdrawing employer with interest under several circumstances," it "says nothing about interest prior to withdrawal." *Ibid.* In the court's view, neither the word "amortize" in 29 U.S.C. 1399(c)(1)A)(i) nor any other language in MPPAA authorizes prewithdrawal interest, which it characterized as "the assessment of interest before an employer's obligation to pay arises." *Ibid.*

In concluding that the Act does not authorize interest from the date on which the employer's withdrawal liability is calculated (at the end of the plan year preceding withdrawal), the court of appeals expressed its agreement with the analysis of the Fourth Circuit in *Borden, Inc.* v. *Bakery & Confectionery Union*, 974 F.2d 528, 536 (1992), "that the MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises." Pet. App. A17. By the same token, the court expressed its disagreement with the decision of the Third Circuit in *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85, 95, 100 (1990), cert. dismissed, 113 S. Ct. 1070 (1993), "[t]o the extent [that] *Huber* suggests that there are circumstances under which

an employer must pay interest for the gap between the * * * calculation date and the date of actual withdrawal." Pet. App. A18. The court below stated that it would not be troubled by an "assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct." *Id.* at A16. The court did not decide that issue, however, because the plan had not contended that interest should be assessed for the period between respondent's withdrawal (August 1981) and the presumed first payment date (January 1982). *Id.* at A18.

DISCUSSION

There are approximately 2,300 defined-benefit multiemployer pension plans in the United States, covering an estimated 8.4 million active and retired workers. Those plans are funded by approximately 720,000 contributing employers. The statutory withdrawal liability provisions at issue in this case have effect every time an employer withdraws from one of those plans. The method of calculating interest on withdrawal liability can make a difference of several million dollars to the plan and to the withdrawing employer. The circuits are in conflict on the proper calculation of interest on withdrawal liability. Large multiemployer plans—such as amicus Central States, Southeast and Southwest Areas Pension Fund—have contributing employers in several States. The plans and their contributing employers may thus be subject to different standards of withdrawal liability, depending solely on the happenstance of the forum for the litigation. Review of the interest issue by this Court therefore is warranted.

1. Three courts of appeals have now considered the question presented in this case, and they have reached different conclusions.

a. In *Huber* v. *Casablanca Industries*, the Third Circuit concluded that interest on withdrawal liability is to be assessed for the entire year between the calculation date and the presumed first payment date. 916 F.2d at 95-100.[9] Because "the unfunded vested benefit calculation represents an employer's share of the amount needed for a fund to break even *as of the calculation date*," the court viewed interest as necessary to compensate the plan for the growth of that amount between the calculation date and the withdrawal date due to the time value of money. *Id.* at 96 (emphasis in original).

The Third Circuit read the language of 29 U.S.C. 1399(c)(1)(A)(i)—establishing an amortization schedule "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs"—as designed to create an "immediate annuity," in which payments are due at the end of payment intervals and the first payment includes both principal and interest. 916 F.2d at 97-98. Under MPPAA, the court reasoned, the "interval is one year, and the first payment is presumed to be due at the *end* of the first year." *Id.* at 98. In the Third Circuit's view, the "only way to construe" the statutory language is to treat it as

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[9] The PBGC participated in *Huber* as amicus curiae in the Third Circuit. See 29 U.S.C. 1302(b)(1). In its brief, the PbGC argued that withdrawal liability does not accrue interest during any period before the first payment is required under the amortization schedule established by the plan sponsor. The *Huber* court rejected the PBGC's position with respect to "gap year" interest. See 916 F.2d at 95-100; Pet. App. A16.

creating an immediate annuity, in which interest accrues during the year preceding the first presumed payment. *Ibid.*[10]

b. In *Borden, Inc.* v. *Bakery & Confectionery Union*, the Fourth Circuit expressly disagreed with the Third Circuit in *Huber*, and disallowed interest for the period prior to the presumed first payment date. 974 F.2d at 536. The court concluded that no provision of MPPAA expressly authorizes interest prior to that date, and it found that statutory silence particularly "telling" (*ibid.*):

> When a statute prescribes amounts and computations with as much detail and thoroughness as is the case with ERISA and fails to authorize interest during a specifically authorized delay in payment, we conclude that the omission was deliberate.

Ibid. The court noted that MPPAA expressly authorizes assessment of interest against an employer that defaults in making withdrawal liability payments (see 29 U.S.C. 1399(c)(5)) but, in the court's view, it makes no specific provision for assessment of

[10] Respondent contends (Br. in Opp. 13) that *Huber* allows interest only for the period *after* withdrawal. But the analysis adopted by the Third Circuit in *Huber* clearly allows interest for the period after the calculation date at the end of the year preceding withdrawal. See 916 F.2d at 95, 96, 99-100. The district court in *Huber* recognized that fact on remand by holding that, "[c]onsistent with the mandate received from the Court of Appeals, it is therefore ordered that * * * [t]he [a]rbitrator shall award interest to the fund on the amount demanded of the withdrawing employer *for the period between October 1, 1981 and September 30, 1982.*" *Huber* v. *Casablanca Indust., Inc.*, No. 87-77, Mem. Dec. (W.D. Pa. Nov. 27, 1990) (emphasis added).

interest between the date on which withdrawal liability is calculated and the presumed first payment date. 974 F.2d at 536.

c. In the present case, the Seventh Circuit offered yet another possible answer to the interest question. The court disallowed interest for the period prior to the employer's withdrawal from the plan, holding that "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises." Pet. App. A17. The court expressly rejected the contrary analysis of the Third Circuit in *Huber*, stating that "[t]o the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the * * * calculation date and the date of actual withdrawal, we disapprove that decision." *Id.* at A18.

Although the Seventh Circuit in this case expressed agreement (see Pet. App. A17) with the analysis of the Fourth Circuit in *Borden* (which disallowed interest for the entire "gap year" between the calculation date and the presumed first payment date), it stated that it "would not be troubl[ed]" by an assessment of interest for the portion of the gap year between the date of withdrawal and the presumed first payment date. *Id.* at A16. The court suggested that "[i]t may help to think of the employer as 'borrowing' the amount of withdrawal liability from the plan on the date of withdrawal, and owing this sum plus interest under the schedule set per § 1399(c)(1)(A)(i)." Pet. App. A17.[11] The court declined to decide whether

[11] A panel of the Third Circuit recently affirmed a district court decision that allowed interest to accrue only from the date of withdrawal, rather than from the calculation date. *Carl Colteryahn Dairy, Inc.* v. *Western Pa. Teamsters & Employers*

interest properly could be assessed between the date of withdrawal and the presumed first payment date, however, because the plan had not specifically made an alternative request for interest for that more limited period. *Id.* at A18.

The three courts of appeals that have addressed the interest issue have thus reached different results: the Third Circuit has interpreted MPPAA to provide for interest beginning as of the "calculation date" (at the end of the year preceding withdrawal); the Fourth Circuit has interpreted the Act to provide for interest beginning at the "presumed first payment date" (at the beginning of the year following withdrawal); and the Seventh Circuit, in this case, has interpreted the Act to preclude interest prior to the date of withdrawal, but possibly to permit interest after that date.[12] Further review by this Court is warranted to resolve the conflict created by the disparate decisions of the courts of appeals.

2. The confusion that this disparate appellate authority has generated for plan administrators and contributing employers is manifest. The statutory calculations required by 29 U.S.C. 1399(c)(1)(A)(i) and

Pension Fund, 8 F.3d 810 (1993)(Table). The panel's summary affirmance has no precedential value in the Third Circuit.

[12] The arbitrators who have considered this question have also reached inconsistent results. Compare, *e.g.*, *Loomis Armored, Inc.* v. *Central States Pension Fund*, 8 Employee Benefits Cas. (BNA) 1899, 1920 (1987) (Tilove, Arb.) (allowing interest after calculation date) with *Carnation Co.* v. *Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409, 1448-1451 (1988) (Nagle, Arb.) (disallowing interest before date of actual withdrawal, but leaving unresolved whether interest is to be assessed from date of withdrawal to presumed first payment date).

(ii) must be made whenever a plan assesses withdrawal liability, and the answer materially affects the amounts employers may owe. Multiemployer plans may have contributing employers conducting business in several circuits. Those plans and employers are currently subject to at least two and perhaps three different rules for making the statutory calculations. See Central States, Southeast and Southwest Areas Pension Fund Amicus Br. at 4-5. Plans and their contributing employers cannot be certain how to apply the law, and they may find themselves involved in litigation in any of several jurisdictions operating under differing versions of the same substantive law.[13]

The conflict in the circuits places plan trustees in an especially awkward position, because they have a fiduciary duty to take appropriate steps to collect money owed to the plan. See 29 U.S.C. 1104(a)(1) (1988 & Supp. IV 1992). "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The fiduciary duty established in ERISA for plan trustees extends to the collection of withdrawal liability. See 29 U.S.C. 1399(b)(1) (the plan "shall" demand payment of withdrawal liability); 126 Cong. Rec. 23,039 (1980) (state-

[13] After satisfying the requirements of mandatory arbitration, either the plan or the employer may bring an action in federal district court for an adjudication of the withdrawal liability dispute. 29 U.S.C. 1401(b)(2). Such actions may be brought "in the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. 1451(d).

ment of Rep. Thompson) ("plan fiduciaries continue to be subject to the general standards for fiduciary conduct"). Because the circuits have reached inconsistent conclusions on the statutory interest question that this case presents, review by this Court is warranted in order to furnish guidance to plan trustees in the fulfillment of their fiduciary responsibilities under ERISA.

3. On the merits, the decision of the court of appeals in this case appears to be incorrect. The principal rationale given by the court of appeals is that it could find no provision of the Act that expressly authorizes "interest" for the year preceding the "presumed first payment" date. Pet. App. A17.[14] That rationale is incorrect.

Section 1399(c)(1)(A), read in context with Section 1399(c)(6), plainly requires that "interest" be added to an employer's withdrawal liability in calculating the

[14] The court of appeals was correct in noting that other provisions of MPPAA specifically call for the imposition of interest in somewhat related situations. For example, 29 U.S.C. 1399(c)(3) provides that "[i]f a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made"; 29 U.S.C. 1399(c)(5) provides that "[i]n the event of a default, a plan sponsor may require immediate payment of the outstanding amount * * *, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made"; and 29 U.S.C. 1399(c)(6) provides that interest charged under subsection (c) *(except under paragraph (1)(A)(ii) of that subsection)* is to be charged at the prevailing market rates for comparable obligations, until the date on which the payment is made. An employer's failure to make a withdrawal liability payment is treated as a delinquent contribution, for which double interest is a mandatory judicial remedy. 29 U.S.C. 1451(b), 1145, 1132(g)(2).

amortization period for the payment of that obligation. See pages 4-6, *supra*. The question is thus not *whether* the Act requires that "interest" be added. The question, instead, is *when* the interest begins to accrue—that is, whether the amortization schedule begins on the calculation date or on the presumed first payment date.[15]

a. Under Section 1399(c)(1)(A)(i), the employer's withdrawal liability is to be paid "over the period of years necessary to amortize the amount in level annual payments." The length of that amortization period (that is to say, the number of "level annual payments" needed to amortize the principal liability) is to be determined by adding interest on the unpaid amount of that liability at the rate assumed applicable in the "most recent actuarial valuation for the plan." 29 U.S.C. 1399(c)(1)(A)(ii). The Third Circuit correctly concluded in *Huber* that interest (at the rate assumed under the plan) must be added from the date of the initial liability calculation in order to "amortize" that liability. 916 F.2d at 98.[16]

[15] The court of appeals did not doubt that interest accrues on this liability *at some point*. The court, however, offered no statutory basis for its conclusion (Pet. App. A16) that interest may accrue *after* withdrawal. Section 1399(c)(1)(A)(ii) makes no distinction between pre-withdrawal and post-withdrawal interest; it merely requires that interest be included in the "determination of the amortization period." Indeed, the court did not even appear to be aware that Section 1399(c)(1)(A)(ii), especially when read together with 29 U.S.C. 1399(c)(6), provides express statutory authority for including that interest. See note 4, *supra*.

[16] Section 1399(c)(1)(A)(i) provides that an employer "shall pay" the "amount determined under section 1391" (as adjusted pursuant to specified provisions of MPPAA) "over the period of years necessary to amortize the amount in level annual

This becomes clear when one considers that the withdrawal liability that is calculated as of the end of the year preceding withdrawal represents the employer's share of the unfunded vested benefits that will be payable in the future, discounted to present value (as of the calculation date) at the assumed rate of interest under the plan. To take a simple example, if an employer withdraws from a plan only one year before the last unfunded benefit of $105 comes due, and if the assumed rate of interest under the plan is 5%, the present value of that unfunded liability one year earlier (as of the end of the plan year preceding withdrawal) would be $100. If interest, at the applicable plan rate, is not added back into the calculated deficiency *from the calculation date forward*, the amount paid by the employer a year later (at the presumed first payment date) would not "amortize" the deficiency. In this simple example, the payment required one year after the "calculation date" to make up the deficiency is $105 ($100 plus $5 interest), not $100. Under the interpretation of the Act adopted by

payments." This language is most naturally read to direct that the "amount" of the employer's liability be amortized from the date as of which that amount is calculated—namely, from the last day of the plan year preceding the withdrawal. Amortization from that date necessarily would include interest from the calculation date to the presumed first payment date. As the Third Circuit explained in *Huber*, by using the term "amortize"—and by indicating that the period of amortization commences with the calculation date (at the end of the plan year preceding withdrawal)—Section 1399(c)(1)(A)(i) structures the payment schedule in the form of an "immediate annuity," which includes both interest and principal in the first payment. 916 F.2d at 98; see generally S. Kellison, *The Theory of Interest* 58-62 (2d ed. 1991).

the court of appeals in this case, however, the plan would be paid only $100, and therefore would not receive a payment that "amortized" the deficiency.

Because the employer's withdrawal liability as of the "calculation date" represents its share of the discounted present value of the plan's unfunded vested benefits, it is necessary to *add back into* that liability the calculation interest that was removed in performing the present-value discount operation. Otherwise, the payment schedule will not "amortize" the liability, as Sections 1399(c)(1)(A)(i) and (ii) require.

b. As an alternative rationale, the court of appeals expressed the view that there is no basis for imposing interest on an obligation that did not exist until the moment of the employer's actual withdrawal. Pet. App. A17. The court of appeals is correct that an employer's withdrawal liability and payment obligation under Section 1399 do not arise until the date of its withdrawal. See, *e.g.*, *Godchaux* v. *Conveying Techniques, Inc.*, 846 F.2d 306, 311-313 (5th Cir. 1988). But that fact is irrelevant to the issue presented here —how the liability is to be calculated once the obligation *has* arisen. The withdrawal does not create the plan's underfunding. The underfunding preceded the withdrawal, and interest is charged on the employer's statutory share of that underfunding from the date as of which it is calculated. See *Huber*, 916 F.2d at 96 & n.25.[17] As the court below recognized,

[17] Although an employer that does not withdraw has no liability and payment obligation under Section 1399, such an employer (along with other employers contributing to the plan) does have a responsibility under the minimum funding standards in 26 U.S.C. 412 to make periodic contributions to the plan in order to eliminate any deficiency in the plan's standard funding account.

Congress selected the end of the year preceding withdrawal as the calculation date in order to spare plan actuaries the necessity of repeated plan valuations throughout the year; having done so, Congress provided that the amount, as so calculated, would be amortized over a period of years from that point forward.

c. The court of appeals expressed concern about the possibility that the employer might have made contributions during the part of the year before the withdrawal occurred, and that those contributions might have reduced the "true" amount of unfunded vested benefits as of the actual withdrawal date. See Pet. App. A17. That possibility cannot be wholly discounted. But it is also possible that the "true" amount of the plan's unfunded vested benefits will have *increased* between the beginning of the plan year and the date of the actual withdrawal. By requiring repayment of the unfunded amount of vested benefits as calculated at the end of the year preceding the date of withdrawal, the Act gives no more direct account of one possibility than of the other. The fact that Congress chose a date other than the date of withdrawal to make the liability calculation should, in any event, be dispositive. There is no basis for ignoring the date that Congress chose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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